NYSBA SPRING/SUMMER 2012 | Vol. 30 | No. 1

Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

It is an honor to be the 2012 Chair of the Corporate Counsel Section. I would like to thank the immediate past chair Greg Hoffman and the members of the Executive Committee for all the hard work last year.

By the time you read this we will have reached out to you in a survey to help us better meet your needs. We welcome your feedback at any time and participation, so please contact me or any of our Executive Committee members to give us your thoughts or how you can volunteer.

One focus for 2012 is to expand the opportunity for in-house counsel to participate in pro bono opportunities. We established the Corporate Counsel Section Fellowship Fund at the New York Bar Foundation to host two diverse New York law students each summer at a public interest legal or charitable organization. Donations to further this Fund can be made at www.tnybf.org.

This year we will continue the Kenneth Standard Diversity Internship program to place six diverse law students in-house for the summer, for a total of 40 interns your Section has hosted since 2006. This year's companies will be Alliance Bernstein, Con Edison, FINRA, NYSTEC, Pepsi and Pitney Bowes. If you wish to host a student in 2013 please reach out to us. Our

Inside

Editors: Janice Handler and Allison B. Tomlinson

SPECIAL ISSUE: WHAT'S NEW IN ETHICS AND PRIVILEGE

former interns will be mentoring new interns and we will be seeking mentors for our Alumni interns. If interested in being a mentor, please contact me.

This fall we will host our ethics CLE program again. Our Technology and New Media Committee continues to improve our timely outreach to members. These are just some of the opportunities we are working on. The Executive Committee and I look forward to serving you this year.

David Rothenberg

Inside Inside

We're so excited about this new issue of *Inside*, which is focusing on Ethical Issues for In-House Counsel. We really wanted to dig deep into the issue of protecting privilege, and decided to get a handful of different perspectives on what special considerations corporate counsel need to think about in order to protect privilege. You'll notice that the varying contributing authors each highlight different factors that corporate counsel should think about, whether it's considerations when working internationally, or being barred in New York State and how that affects privilege, and so forth.

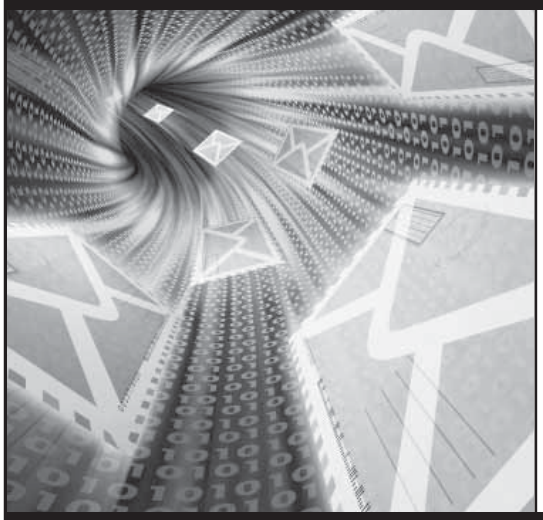
We also wanted to add in some fun tidbits for our readers, so we have a great book review which we think you will enjoy, a special article about our signature diversity internship program, and given that the Olympics are coming, we added an article from one of our friends across the pond about the legal issues to think about if you happen to have a London office or an office in a city where a major event like the Olympics is coming to town.

If you would like to contribute an article for an upcoming issue, please feel free to contact us.

Enjoy,
Allison B. Tomlinson, Esq.

Allison is a member of the Executive Committee of the Corporate Counsel and International Sections of the New York State Bar, and the co-editor of the *Inside* newsletter. She is also Regional Counsel at Gensler, a global architecture and design firm, based in the New York office.

Request for Articles



If you have written an article and would like to have it considered for publication in *Inside*, please send it to either of its editors:

Allison B. Tomlinson
Gensler
1230 Avenue of the Americas
Suite 1500
New York, NY 10020
allison_tomlinson@gensler.com

Janice Handler
handlerj@aol.com

Articles should be submittted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/Inside

The Attorney-Client Privilege: Considerations for In-House Counsel

By Clayton Wire

It should come as no surprise that the relationship between in-house counsel and their corporate employer is significantly different from the relationship between independent counsel and their clients. Yet even though this difference exists as a practical matter, there is no separate set of rules or standards that govern the in-house attorney-client relationship. Fundamentally, in-house counsel are governed by the same rules as their independent peers. However, while the same "rules" may apply, courts have long recognized that there are certain unique factors and circumstances that must be considered in the evaluation of ethics and privilege issues when in-house counsel are involved.[1] This article will focus on confidential client information, including privileged communications, and the unique issues that arise in the in-house counsel and client/employer relationship.

The "Client"

For purposes of both the attorney-client privilege and in-house counsel's ethical obligations, the corporate entity itself is the "client."[2] As a result, the corporation's actions can have a direct impact on the applicability of the attorney-client privilege. When the corporate client/employer fails to properly protect the "confidentiality" of attorney-client communications the attorney-client privilege will likely not apply. In-house counsel must be aware that not every employee within the corporation is a representative of the "client," and therefore not every communication is considered "confidential." Accordingly, internal communication standards must be adjusted to protect confidences and ensure the applicability of the privilege.

The "Client" for Purposes of Confidential Communications

While the corporate entity itself may be an in-house attorney's "client," this client can only act through its duly authorized representatives. "The client is a corporation, an entity that communicates by individuals who hold positions as officers, directors, or employees. There is no one person in the corporate hierarchy that is the 'client,' instead a myriad of people in executive or director positions within the corporation may be in contact with counsel on a legal matter."[3] However, this "myriad" of people is limited, and communications with employees other than those with authority to act on behalf of the client or with involvement in the relevant subject matter may not be "confidential," and thus not privileged.

While there is little New York law on the subject, state courts will likely follow the majority of federal courts by analyzing satisfaction of the privilege's confidentiality component through a "need to know" test.[4] Under this "need to know" analysis, where materials are shared within a corporate organization asserting the attorney-client privilege, the corporation has the burden of showing that it preserved the confidentiality of the communication by limiting dissemination only to employees who "need to know" the legal advice at issue.[5]

This "need to know" standard hinges on the answer to one question: "[D]id the recipient need to know the content of the communication in order to perform her job effectively or to make informed decisions concerning, or affected by, the subject matter of the communication?"[6] Federal courts in New York have clarified that "'[t]o the extent that the recipient of the information is a policymaker generally or is responsible for the specific subject matter at issue in a way that depends upon legal advice, then the communication is more likely privileged.'"[7]

For in-house counsel this "need to know" standard can have a significant impact on day-to-day interaction with other employees of the "client." In particular, in-house counsel should always be cautious about hitting the "reply all" button when responding to emails. If the person who sent the email has cast too broad a net by including employees who are not policymakers or are generally not responsible for the specific subject matter at issue as recipients, the in-house counsel should cull the herd and only reply to those individuals who have a "need to know" the legal advice being given. It may also be beneficial to provide training for those in policymaking positions regarding the employees who "need to know" the information, in order to avoid the loss of confidentiality for otherwise privileged communications.

Maintaining the Privilege

In-house counsel have an affirmative obligation to act in the organization's best interests, which includes maintaining the privileged nature of confidential communications.[8] In-house counsel, and especially general counsel, play a dual-role in this context, as both the internal legal counsel for the company and the client for the company's interaction with outside counsel. Consequently, in-house counsel must address privilege issues from both perspectives, as attorney and as a "client." Generally, the

attorney-client "privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel."[9] However, application of the privilege is often much more difficult than this simple rule.

Protecting Internal Confidential Communications

Application of the attorney-client privilege to the corporate context poses "special problems."[10] One such problem results from in-house counsel's dual roles as legal advisors and business consultants.[11] In fact, "[t]heir day-to-day involvement in their employer's affairs may blur the line between legal and non-legal communications," which causes courts to "cautiously and narrowly" apply the attorney-client privilege in cases involving in-house counsel, "lest the mere participation of an attorney be used to seal off disclosure."[12] This stricter approach to the attorney-client privilege in matters regarding in-house counsel results in part from the belief that such attorneys "are not as independent as outside counsel" because they are employees and "their livelihood depends on that single corporate client."[13]

While the general rule is that the attorney-client privilege protects "legal advice" but does not protect "business advice," there is no black and white rule regarding what constitutes one type of advice or the other.[14] The closest thing to a rule is the generally accepted principle that in order to be privileged the communication "must be *primarily or predominantly of a legal character.*"[15] "So long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters."[16]

In order to properly preserve the privileged nature of her confidential communications, an in-house attorney should constantly consider the impact that this business advice versus legal advice dichotomy has on her day-to-day actions.

First, in-house counsel should keep their legal and business roles separate. Many in-house counsel have titles that indicate their legal and non-legal roles, for instance "General Counsel" and "Senior Vice President." In-house counsel should always be aware of which title they are using in communications and in acting on behalf of the company. In other words, when writing an email regarding legal advice on a particular issue, use the "General Counsel" title, and use the business title for business advice.

Second, while the corporate employer may want to protect as much as possible under the privilege, it is good practice to formally and explicitly divide legal advice from business advice. For instance, an in-house attorney should only place "attorney-client privileged communication" in the header or footer of a communication that meets the strict requirements of the attorney-client privilege in corporate settings. If the corporation ends up having to produce communications for *in camera* review, a claim of privilege will have more credibility if the in-house attorney has already engaged in a candid assessment of what is in fact privileged at the time the communication is made, and labeled the communication accordingly.

Third, corporate officers, executives and employees should be trained to always be explicit about what type of advice they are asking for. For example, when an executive asks the general counsel for advice regarding the impact of a new regulation on the company's practices, the executive should explicitly state "I would like your legal advice on the impact of _____," in the communication. However, this should not be abused. In order to build credibility with any court that may review the communication, it is better to only use such express declarations of privilege when it is actually necessary. Elevating form over substance in this regard may be attractive, but it will undoubtedly damage any assertion of the privilege.

If the corporate employer can show the reviewing court that their in-house counsel are careful about distinguishing between "legal advice" and "business advice," the court is much less likely to strictly scrutinize the substance of the communications themselves. While taking these steps may not ensure the privileged status of any communication, they certainly will go a long way toward making the corporation's in-house counsel and employees aware of the issue and will lend credence to any claim of privilege with a reviewing court.

Privilege May Be Unavailable for International or Foreign Communications

In-house counsel for multi-national entities must be aware that even if you follow the three suggestions above, internal communications with in-house counsel relating solely to requests for legal advice may *not* be protected from discovery in some jurisdictions. One cautionary example is the European Union, where there is no privilege for communications between the entity and its in-house counsel. In *Akzo Nobel Chemicals and Akcros Chemicals*, the Court of First Instance held that communication between companies and in-house counsel is not privileged because an in-house counsel, even if she is an admitted attorney or advocate, is not an independent lawyer but structurally, hierarchically and functionally related to the company.[17] In-house counsel should be aware of the possible courts into which their employer may be haled, as even confidential communications regarding purely legal matters may not be afforded any privilege in many international and foreign courts.[18]

Moreover, in cases involving the application of a foreign jurisdiction's substantive law, domestic courts have applied foreign evidentiary rules to permit discovery and use of confidential communications between a corporation and its in-house counsel. For instance, in *In re Rivastigimine Patent Litigation* the U.S. District Court for the Southern District of New York applied Swiss law in a patent application matter and determined that "communications of Swiss in-house counsel are not protected by a privilege comparable to attorney-client privilege."[19] In sum, in-house counsel for multi-national companies should always consider the implications of litigation or prosecution in foreign jurisdictions, or in domestic courts governed by foreign substantive law, when coordinating the protection of internal communications.

Conclusion

While in-house counsel must abide by the same "rules" as every other attorney, their peculiar position as both attorney and employee means that there are many additional factors to consider, especially in the areas of confidential information and privileged communications. An in-house attorney has an obligation to protect the privileged communications of her employer. In order to effectively do this, she must consider her multi-faceted role in the organization and the roles of the recipients of her legal advice. It is always good to remember that credibility with any reviewing court will get you a long way towards protecting the documents that you want to remain privileged. Further, consideration must be given to the standard that will be applied, as some countries and foreign courts do not recognize the attorney-client privilege for in-house counsel's communications. By planning ahead an in-house attorney can significantly increase the chances that internal communications will be protected by the cloak of privilege if any reason to examine them should arise.

Endnotes

1. *See, e.g., Georgia-Pac. Plywood Co. v. U.S. Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956) (recognizing in-house counsel's dual roles as attorney and corporate employee and determining that privilege only applies to those communications in which the in-house counsel is functioning as an attorney).
2. *See* New York Rule of Professional Conduct 1.13 (noting that it is the organization's interests that an attorney must consider, as opposed to the interests of the organization's executives or employees); *Orbit One Communications, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 104 (S.D.N.Y. 2008) (Under New York law, "[i]n cases of corporate representation, the attorney-client privilege belongs to the corporation.").
3. *Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.*, 738 N.Y.S.2d 179, 190 (Sup. Ct. 2002).
4. *Id.* at 189 n.10 ("The New York Court of Appeals described the attorney-client statute as a "mere re-enactment of the common-law rule"; thereby allowing federal precedent to be reviewed in assessing the application of this privilege."); *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. 163 (S.D.N.Y. 2008) (holding that "need to know" test applies under New York law).
5. *Allied Irish Banks*, 252 F.R.D. 163.
6. *Scholtisek v. Eldre Corp.*, 441 F. Supp. 2d 459, 464 (W.D.N.Y. 2006) (collecting cases).
7. *Id.* (*quoting Verschoth v. Time Warner Inc.*, No. 00CIV1339, 2001 WL 286763, at *2 (S.D.N.Y. Mar. 22, 2001)).
8. *See* New York Rules of Professional Conduct 1.6 and 1.13.
9. *Rossi v. Blue Cross & Blue Shield of Greater New York*, 73 N.Y.2d 588, 592, 540 N.E.2d 703, 705 (1989).
10. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).
11. *See MSF Complex Sys., Inc. v. ABN AMRO Bank N.V.*, 08 CIV. 7497 LBS FM, 2011 WL 5126993 (S.D.N.Y. Oct. 26, 2011).
12. *Rossi*, 73 N.Y.2d at 592, 593; *see also U.S. Postal Service v. Phelps Dodge Refining Corp.*, 852 F.Supp. 156, 160 (E.D.N.Y. 1994) ("Defining the scope of the privilege for in-house counsel is complicated by the fact that these attorneys frequently have multi-faceted duties that go beyond traditional tasks performed by lawyers").
13. *Bank Brussells Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002).
14. *See ABB Kent-Taylor, Inc. v. Stallings & Co., Inc.*, 172 F.R.D. 53, 55 (W.D.N.Y. 1996); *see also Phelps Dodge Refining*, 852 F.Supp. at 160 ("Needless to say, the attorney-client privilege attaches only to legal, as opposed to business services").
15. *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 378, 575 N.Y.S.2d 809, 581 N.E.2d 1055 (1991) (emphasis added).
16. *Rossi*, 73 N.Y.2d at 594; *see also Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc.2d 99, 106, 756 N.Y.S.2d 367, 376 (N.Y. Sup. Ct. 2003) ("The fact that business advice is sought or even given does not automatically waive the [attorney-client] privilege, 'where the advice given is predominantly legal, as opposed to business, in nature [.]' ") (quoting *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990)).
17. (Rs. T-125/03 and T-253/03, Slg. 2007, II-03523), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003TJ0125:EN:PDF.
18. A good reference for the applicable rules regarding the attorney-client privilege and its relation to in-house counsel in foreign and international courts can be found on the Lex Mundi website at http://www.lexmundi.com/lexmundi/InHouseCounsel_AttorneyClientPrivilege_Guide.asp.
19. *In re Rivastigimine Patent Litig.*, 239 F.R.D. 351, 360 (S.D.N.Y. 2006).

Clayton Wire is an associate at Starrs Mihm LLP, a boutique litigation firm in Denver, Colorado. His practice areas include employment law and legal malpractice. Through these practice areas Mr. Wire has been privileged to represent in-house counsel and other corporate executives who have been wrongfully terminated, as well as corporate clients whose attorneys, both in-house and outside, have committed malpractice. Mr. Wire may be contacted at clayton.wire@starrslaw.com.

Do New Technologies Threaten Your Privileged Communications?

By Carla R. Walworth and Mor Wetzler

New technologies have transformed communications between lawyers and their clients and pose unique problems for preserving the attorney-client privilege, the work product doctrine, and lawyers' ethical duty to maintain client confidences.

The Privilege Basics

The attorney-client privilege provides absolute protection to most confidential communications between clients and their lawyer. The purpose is for clients to feel free to share all of the facts with those who can guide their conduct in the right direction. This is based on the principle that lawyers cannot help their clients if the clients worry that third parties might later learn what clients tell their lawyers. In essence, the attorney-client privilege protects confidential communications by a client to an attorney made in order to obtain legal assistance from the attorney in his or her capacity as a legal adviser as well as the advice given by the lawyer in the course of representing the client. A related protection, the attorney work product immunity, arises from the same fundamental concerns underlying the attorney-client privilege. It seeks to avoid invading an attorney's trial preparation. The rule limits the discoverability of materials prepared in anticipation of litigation or for trial, and admonishes that, even where discovery is ordered, courts must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Waiver of the Privilege

Because a core element of any privilege is the confidential nature of the communication, disclosure to third parties usually waives the privilege. The presence of a third party will waive the privilege unless that party is a representative of the attorney or client, has a common legal interest, or in some jurisdictions, is an attorney or client's agent. The loss of confidentiality through disclosure of work product materials also waives that protection. The party seeking to overcome the privilege bears the burden of establishing that a waiver has occurred.

Oftentimes, waiver of the privilege may be inadvertent. The approaches to inadvertent waiver vary by jurisdiction and fall into three schools of thought. The most lenient approach considers that "to err is human" and finds that waiver requires an intentional and knowing relinquishment. Therefore, an inadvertent disclosure can only constitute a waiver if it occurs through the gross negligence of the client, and an attorney's negligence cannot waive the privilege. The harshest approach, on the other hand, applies a strict accountability, finding that once confidentiality is lost, it cannot be restored, and the privilege has been waived even if the disclosure was inadvertent. The third approach weighs several factors, including (1) reasonableness of precautions; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; (5) the "overriding issue of fairness." Fed. R. Evid. 502(b). Applying these factors, the Southern District of New York in *Jacob v. Duane Reade, Inc.* found that defendants waived the privilege by inadvertently disclosing a two-page email that included advice from an in-house lawyer. 11 Civ. 0160, 2012 U.S. Dist. LEXIS 25689 (S.D.N.Y. Feb. 28, 2012). During the review of over two million documents, the email was not identified as privileged because it was not sent to or from an attorney, no attorney was copied on the email, and the attorney present at the meeting the email covered was referred to only by her first name, Julie. The court rejected the plaintiffs' argument that defendants did not employ reasonable measures to prevent the disclosure of privileged material. However, in considering the other factors, the court found that the defendants did not act diligently in rectifying the inadvertent disclosure and that the delay also contributed to the court's analysis of fairness and prejudice. 2012 U.S. Dist. LEXIS 25689, at **16-19.

In New York state courts, inadvertent disclosure waives the privilege unless the party asserting the privilege can prove that (1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure, (2) it promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted. *See New York Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 (2002). Moreover, the consequences of a waiver can range from a limited waiver of privilege as to a particular item of information, to subject matter waiver for all items related to the relevant issue, to a complete waiver for the entire data collection.

Therefore, to protect privileged communications with their clients, attorneys must take reasonable steps to

avoid inadvertent waiver through disclosure to third parties. However, technology has transformed communications between lawyers and their clients and poses unique problems for preserving the attorney-client privilege. For example, there are certain risks unique to cloud computing and social media.

Privilege in Cloud Computing

One such risk area is in the context of cloud computing—a metaphorical phrase referring to third-party controlled services that users access over the Internet, including web-based email accounts and document storage sites. Because a communication's confidentiality is critical to maintaining the attorney-client privilege, practitioners must be aware of whether communications sent in the cloud are private.

Caselaw establishes that communications do not lose their privileged character simply because they were sent by cloud-based email. Rather, courts look at other factors, including reasonable expectation of privacy, to determine whether an emailed communication is confidential. To determine whether the employee had a reasonable expectation of privacy in the communications with counsel, courts will consider the following factors: (1) whether there is a company policy banning personal or other objectionable use; (2) whether the company monitors use of employees' computer or email; (3) whether third parties have a right of access to the computer or emails; and (4) whether the company notified the employee or the employee was aware of the use and monitoring policies. *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (S.D.N.Y. 2005).

Applying these factors is a fact-specific analysis, and the cases often turn on a specific policy, practice, or actions by the employee. For example, in *Scott v. Beth Israel Med. Ctr.*, a New York court held that an employee who communicated with counsel via the company email account had waived the attorney-client privilege as well. 847 N.Y.S.2d 436, 442-43 (N.Y. Sup. Ct. 2007). The court relied heavily on the company's computer-use policy—which prohibited employees from sending personal emails—in reaching its decision. In contrast, the court in *Curto v. Medical World Communications, Inc.* found that the affirmative steps taken by the privilege-holder to delete email communications with her counsel from her corporate-issued laptop computer and to prevent the transfer of the messages into the corporate system were sufficient to sustain a finding of non-waiver. 2006 WL 1318387 (S.D.N.Y. May 15, 2006).

Other jurisdictions have conducted the same "expectation of privacy" analysis. For example, in *Stengart v. Loving Care Agency*, 990 A.2d 650 (N.J. 2009), the New Jersey Supreme Court held that the attorney-client privilege protects communications that an employee transmits over a cloud-based email account, even when the email is sent on a company computer. The plaintiff in *Stengart* used a company laptop to send emails from her Yahoo! Mail account to her attorney regarding a possible suit against her employer. *Id.* at 656. The employer then used monitoring software to obtain these emails without the employee's knowledge. Upon learning of the disclosure, plaintiff's counsel requested the emails' return. Despite company policy alerting employees that they had no expectation of privacy on work computers, the court found that the attorney-client privilege protected the emails. *Id.* at 663. The plaintiff had taken precautions to keep her discussions with counsel confidential, and company policy did not expressly declare that it would monitor communications made from personal email accounts. Thus, because plaintiff had a reasonable expectation of privacy in her emails, the privilege had not been waived. That the email had been sent in the cloud was not a determinative factor in the court's decision.

Similarly, in another case involving the privilege of emails sent from a work computer, the California Court of Appeal did not consider whether the communication had been sent in the cloud as a factor affecting the email's confidentiality. In *Holmes v. Petrovich Development Co.*, 119 Cal. Rptr. 3d 878 (Cal. Ct. App. 2011), the court held that an employee's communications to her attorney from her work email account did not constitute a confidential communication for the purpose of the attorney-client privilege. Unlike the situation in *Stengart*, the plaintiff here had not used a personal email account and was subject to a more stringent company policy that expressly stated that emails from work accounts would be periodically monitored. With these factors in mind, the *Holmes* court found that the employee could have no reasonable expectation of privacy in her emails and that the attorney-client privilege had been waived.

As these previous cases demonstrate, transmission by cloud-based email is, by itself, not enough to destroy the confidential nature of an otherwise privileged communication. Rather, courts engage in fact intensive inquiries, looking at whether third parties had lawful access to the communications, in order to determine whether an email is confidential for privilege purposes. In general, lawyers and their clients can communicate securely through electronic means, and a lawyer's ethical duty to maintain client confidences requires that a lawyer must ordinarily warn the client of the risk of sending or receiving emailed communications only where there is a "significant risk" that a third party may gain access. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011).

The Risks of Social Media

Social media sites provide another potential forum to waive the privilege by public disclosure of confidential information, and attorneys must understand the technology to avoid inadvertent waiver. With increasing frequency, litigants and even government investigators are turning to social media websites for evidence. *See EEOC v. Simply Storage Mgmt.*, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (allowing discovery of plaintiff's Facebook and MySpace accounts in a sexual harassment case against plaintiff's employer to determine mental health at the time of the alleged harassment). Courts have addressed whether a person can ever have a reasonable expectation of privacy in communications posted on social media websites, and whether such postings automatically waive the confidentiality of an otherwise privileged communication.

Recent decisions indicate that communications made over social networking sites are not confidential. *See McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 at *9 (Pa. County Ct. Sept. 9, 2010) ("When a user communicates over Facebook or MySpace, he or she understands and tacitly submits to the possibility that a third-party recipient…will also be receiving his or her messages…."). In a case addressing the confidentiality of social media, a Pennsylvania court ordered a personal injury plaintiff to allow opposing counsel access to his password-protected Facebook and MySpace accounts to investigate whether information on those sites contradicted his claims. *Id.* at *12-13. The court stated that absent an applicable privilege, nearly any relevant materials were discoverable, and because operators of Facebook and MySpace had complete access to all site content, there could be no expectation of privacy in communications made on such forums. *Id.* at *11-12.

Using social media websites to discuss privileged communications also raises a danger of waiver. In *Lenz v. Universal Music Corp.*, No. 5:07-03783, 2010 U.S. Dist. LEXIS 125874 (N.D. Cal. Nov. 17, 2011), a California court found that the plaintiff in a copyright infringement suit had waived the attorney-client privilege through emails to third parties and blog posts regarding conversations with counsel. Plaintiff had sued Universal Music Corporation, claiming that Universal knowingly misrepresented that a video plaintiff posted on YouTube infringed Universal's copyright in a song. *Id.* at *2-3. Before and after filing her claims, plaintiff visited several online chat rooms and blogs where she discussed conversations she had with counsel regarding her motivation for filing suit. Universal discovered the postings and argued that, in making them, plaintiff waived the attorney-client privilege. The court held that because the communications related to the substance of plaintiff's conversations with counsel, plaintiff had waived the privilege. *Id.* at *6-8.

Parties also might be unable to rely on websites' privacy restrictions to protect communications. In *Largent v. Reed*, No. 2009-1823 (Pa. Comm. Pls. Nov. 7, 2011), a personal injury plaintiff alleged serious and permanent physical and mental injuries resulting from an accident. Defendant Reed wanted access to plaintiff Largent's Facebook page (which she recently changed to "private"), claiming that Largent had posted several photographs showing her enjoying life with her family and a status update about going to the gym. Largent refused, claiming that by making her Facebook page "private," she had a reasonable expectation of privacy in the information she posted there. The court disagreed, admonished Largent for attempting to hide relevant facts behind a "private" Facebook page, and held that everything on the page must be disclosed. "By definition, there can be little privacy on a *social* networking website," the judge explained. "Facebook's foremost purpose is to 'help you connect and share with the people in your life.' That can only be accomplished by sharing information with others. Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets."

These cases emphasize that parties who wish to maintain the confidentiality of a communication should not post related information online. Although social media websites such as Facebook may designate certain aspects of a user's account private, courts could find that users who post on these sites have no reasonable expectation of privacy in their postings. While one can imagine a situation where the outcome could be different, this would be a fact-specific inquiry based on the particular attributes and use of the technology—an ever-shifting arena.

Conclusion

The attorney-client privilege, work product doctrine, and a lawyer's ethical duty to maintain client confidences are foundational principles of legal practice in the United States. Examining how modern technology has affected its application reveals some of the complications underlying this legal doctrine. Since confidentiality is paramount to the attorney-client privilege, clients who wish to preserve the privilege should beware the risks to confidentiality that the use of modern communications present so that they are better equipped to take measures to maintain the privilege.

Carla R. Walworth is a partner in the litigation department at Paul Hastings and can be reached at carlawalworth@paulhastings.com. Mor Wetzler is an associate in the litigation department at Paul Hastings and can be reached at morwetzler@paulhastings.com.

Is It Privileged? Privilege Issues for In-House Counsel

By Robert LoBue

The attorney-client privilege is a potent and practical rule of law based on the recognition that "sound legal advice or advocacy…depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege bars the compelled disclosure of communications between an attorney and client when the communication was made in confidence for the purpose of seeking legal advice. Like all attorneys, in-house counsel must be cautious in protecting communications that fall under this rule; care should be taken to satisfy each requisite element and inadvertent disclosures should be avoided or quickly remedied. Yet, in-house counsel, whose clients are not individuals but corporations comprised of numerous employees, face unique challenges in doing so. It may be, in the words of *Upjohn*, that the privilege is meant to encourage "full and frank communication" between attorney and client, but to whom can in-house counsel freely speak when the client is a corporation? Are only executives' communications with counsel protected, or does the privilege extend to communications with all employees? Is a conversation with a former employee privileged? Are foreign in-house counsel treated the same as U.S. corporate counsel for privilege purposes? And, when in-house counsel also provides business advice, what information will be protected?

Elements of the Privilege Applied to In-House Counsel

Although the general rule of attorney-client privilege is easily stated, there are several wrinkles when the rule is applied to in-house counsel. For example, "client" and "confidential" take on special meaning in the in-house context. The corporation is the client, yet in-house counsel must discuss legal strategy and otherwise interact with employees whom the counsel does not represent and whose interests may end up diverging from that of the client. Nonetheless, the privilege is protected when the corporation distributes legal advice received from counsel through corporate employees, and information gathered by employees for transmission to counsel for the rendering of legal advice is also usually privileged.

The very definition of "attorney" takes on some complexity in the in-house context. In-house counsel who are admitted in other states can register to practice in New York under Part 522 of the Rules of the New York Court of Appeals, so long as they register within 30 days of employment and maintain bar membership obligations in the state of admission. Registration only authorizes an attorney to provide legal services to the *corporation*, and not to "any customers, shareholders, owners, partners, officers, employees or agents of the identified employer." Part 522.4(c). Providing legal services to such other parties is not only unauthorized, but likely will not be protected by the attorney-client privilege. On the other hand, if the attorney is admitted to practice in New York, courts often protect communications when an employee seeks legal advice about personal matters, so long as the employee made clear that she was seeking legal advice in an individual capacity and the communication was not about general corporate matters.

More complications arise in the case of foreign in-house counsel for U.S. corporations. Courts have taken divergent views: some have held that a legal practitioner functioning as such in a foreign country qualifies as an "attorney" for purposes of the attorney-client privilege, regardless of whether the foreign counsel is admitted in a U.S. jurisdiction or in his home country. *See, e.g.*, *Renfield Corp. v. E. Remy Martin & Co. S.A.*, 98 F.R.D. 442, 444 (D. Del. 1982) (applying privilege under U.S. law because French in-house counsel, although not members of a bar, were the "functional" equivalent of U.S. lawyers, as they were competent to render legal advice and permitted by law to do so). Other courts have held that communications with foreign in-house counsel are only privileged where the parties have a reasonable expectation of confidentiality under the privilege laws of the foreign country. *See Louis Vuitton Malletier v. Dooney & Bourke*, No. 04 Civ. 5316 (RMB)(MHD), 2006 WL 3476735, at *17-18 (S.D.N.Y. Nov. 30, 2006) (declining to follow *Renfield* and instead looking to whether the participants in the communication expected that it would be confidential; because French law did not provide privilege for French in-house counsel, the court concluded that no privilege could be asserted); *see also Honeywell Corp. v. Minolta Camera Co.*, Civ. A. No. 87-4847, 1990 WL 66182, at *3 (D.N.J. May 15, 1990) (finding that *Renfield* was "contrary to the law of [the Third] Circuit," and denying application of the privilege because the Japanese corporate employee was not licensed to practice law or a registered patent agent in any country). Further, the European Court of Justice has held that under E.U. law there is no "legal professional privilege" for communications with in-house counsel, because in-house lawyers are not considered independent due to their employment by the corporation. *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, C-550 / 07 P (Sept. 14, 2010). Thus,

a domestic corporation cannot assume that its communications with foreign in-house counsel will be protected under either U.S. or foreign law.

Exceptions to and Waivers of Attorney-Client Privilege

A party may be foreclosed from reliance on the attorney-client privilege due to either an exception to the general rule or waiver of the privilege. There are several exceptions to the privilege, such as when the communication is used to further a crime or fraud, when the party invoking the privilege has put the communications "at issue" (by, say, pleading an advice-of-counsel defense), or when the attorney waives the privilege in order to defend himself in litigation or collect a fee. In-house counsel must be particularly wary of the "fiduciary exception." This exception is applicable to communications between a fiduciary and an attorney when the fiduciary sought legal advice for the benefit of the party seeking disclosure of the communication. This exception is based on the premise that both parties in the fiduciary relationship have "a mutuality of interest" in the fiduciary's freely seeking legal advice, and that the fiduciary does not act for its own benefit but for the benefit of others—stockholders, union members, clients, etc. *See In re Stenovich*, 756 N.Y.S.2d 367, 380 (N.Y. Sup. Ct. 2003). When such a relationship exists, the court will determine whether "good cause" exists to require production of otherwise protected documents. For example, in a shareholder litigation, *Stenovich* held that a shareholder can obtain information about otherwise privileged communications between the board of directors and corporate counsel regarding the specific details of merger negotiations. Although often invoked in the context of derivative suits, the "controlling feature" of this exception is "whether the legal advice was sought for the benefit of the party seeking disclosure as a result of a fiduciary relationship." *Id.* at 381.

Because the privilege belongs to the client, it can be waived by the client. When the client is a corporation, "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). That principle can lead to some unexpected results when a change of control occurs. When control of the corporation passes to new management only the new management has the authority to assert or waive the privilege, and an assignee of all or substantially all of a corporation's assets can also assert or waive the corporation's privilege. For example, if a corporation sells one of its subsidiaries and the purchaser later claims breach of the sale agreement, the purchaser may waive privilege as to communications that the selling corporation's general counsel had with management of the subsidiary before the sale. Similarly, the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications.

The common interest doctrine allows parties facing common legal problems in pending or threatened civil litigation to communicate with each other, but in-house counsel should be cautious not to inadvertently waive the attorney-client privilege by over-reliance on that principle. The common interest doctrine does not create any privilege for communications where one does not otherwise exist; it merely protects against an argument that the sharing of otherwise privileged matters constitutes a waiver. The common interest privilege, moreover, does not protect communications when the parties merely share some common *business* as opposed to legal interest. For example, courts have found the attorney-client privilege to be waived when a party's counsel communicated with investment banks regarding certain business aspects of a merger. *See In re Stenovich*, 756 N.Y.S.2d at 378. If corporate counsel intend to rely on the common interest doctrine, they should enunciate that intent before sharing communications and ideally reduce the understanding to a written agreement.

The Scope of Protection for Corporate Communications

Current employees: Two tests have been articulated for determining whether communications with current corporate employees are privileged. The minority view, now relegated primarily to Illinois, is the "control group" test. Under that test, the privilege may be invoked only with respect to communications with employees who are in a position to control, or take a substantial role in determining, the course of action a corporation may take based on the legal advice.

The majority rule, which is used in all non-diversity federal and most state cases, is the "subject-matter" or *Upjohn* test. This rule was created because the control group test was thought to "discourag[e] the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Upjohn*, 449 U.S. at 392. Under this test, communications regarding the subject matter of a legal representation are protected as long as they were made by employees to in-house counsel at the direction of corporate superiors and the employees were aware that they were being questioned so the corporation could receive legal advice. This approach allows in-house counsel to gather facts from employees of non-executive rank in appropriate cases.

Former employees: Courts have recognized the need for corporate counsel to obtain knowledge from former employees in order to advise the corporation. As a result,

the attorney-client privilege may extend to communications between corporate counsel and a former employee if these communications (1) concern knowledge obtained or conduct which occurred during the course of the former employee's employment with the corporation; or (2) relate to communications which themselves were privileged and which occurred during the employment relationship. This does not mean that former employees are insulated from contact by an adversary's attorney; the opposing counsel need only advise the former employee of his representation and interest in the litigation and direct the former employee to avoid disclosing privileged or confidential information. *Muriel Siebert & Co., Inc. v. Intuit, Inc.*, 8 N.Y.3d 506, 511 (2007).

Mixed business and legal responsibilities: Many in-house counsel serve multiple roles in a company, often providing both business and legal advice. Courts are wary of assertions of privilege by attorneys with these dual responsibilities. For example, in *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984), the court held that where the in-house counsel was a "[c]ompany vice-president, and had certain responsibilities outside the lawyer's sphere…[t]he company can shelter the [counsel's] advice only on a *clear showing* that the [counsel] gave it in a professional legal capacity" (emphasis added). Other courts have held the test to be "whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance." *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 798 (E.D. La. 2007).

A communication that mixes business and legal advice does not automatically lose its privilege. Instead, courts will look at a number of different factors:

The substance of the communication. Courts will not protect communications where a substantial portion of the communication involved the rendering of business advice by the in-house counsel. However, the inverse is not necessarily true—even where legal aspects predominate, courts may separate the two spheres as much as possible and only protect those parts that are identifiable as legal.

The purpose of the communication or meeting. Courts will look to whether the communication or meeting was designed to address problems which can be characterized as predominantly legal. One case, *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125 (RPP), 1996 WL 29392, at *4 (S.D.N.Y. Jan. 25, 1996), held that the negotiation of a contract by in-house counsel is a business and not a legal task. However, most courts focus on whether changes to contracts were legal in nature or business-related (*e.g.*, prices of goods or services).

The title of the in-house counsel. Titles that mix business with legal roles (i.e., Vice President of Development and Assistant General Counsel) weigh against the privilege. As part of this inquiry, courts sometimes look at the counsel's position on the corporate organizational chart.

Who the in-house counsel communicated with. Simply including the in-house counsel as one of several recipients to a communication or one of several participants at a meeting is not sufficient to establish privilege.

Recommendations for Protecting the Privilege

There are many common-sense steps that in-house counsel can take to better protect the privilege. First, clearly indicate when a communication is legal in nature. Documentation that a communication is for legal purposes—whether in the form of express disclaimers, prefatory language (such as "the meeting was held to discuss the legal consequences of…" or "this meeting was held in anticipation of litigation"), and email subject lines—ensures that the recipient will keep in mind the obligations of confidentiality and also helps convince a court that the communication addresses legal and not business concerns. Clear and visible designation also makes it less likely that privileged information will be inadvertently disclosed to a third-party or produced in litigation to opposing counsel.

Second, when in-house counsel occupies multiple positions, non-legal roles should be kept as distinct as possible from legal roles. Because courts require a "clear showing" that such counsel was acting in a legal capacity, it is best to ensure that meetings, documents, and conversations address only one of the counsel's roles—either business or legal—and attend to the other issues separately. If business issues were to arise at a "legal" meeting, the attorney-client privilege could very well be lost if the legal issues are not found by a court to have predominated.

Third, communicate regarding privileged matter—*i.e.*, rendering legal advice or collecting information so as to render such advice—on a need-to-know basis. When litigation has ensued or is anticipated, discussions regarding legal strategy and issues should take place outside the presence of likely witnesses.

Finally, the conduct of corporate investigations when illegal conduct is suspected or has been alleged can present special problems that are often best handled by outside counsel. In particular, the *Upjohn* decision requires that specific warnings be given to interviewees in order to preserve the corporate attorney-client privilege.

Robert LoBue is Managing Partner of Patterson Belknap Webb & Tyler LLP. He has been a litigator with the firm for over 30 years and frequently lectures on legal ethics, privilege, and other practice issues. **Thanks to Catherine Geddes for her assistance in the preparation of this article.**

Corporate Counsel: The Ethical Duty of Confidentiality and the Attorney-Client Privilege

By Thomas Paschos

Introduction

The ethical duty of confidentiality and attorney-client privilege are the foundations upon which lawyers provide service to clients. The principle of client-lawyer confidentiality is given effect by the rule of confidentiality established in professional ethics and the attorney-client privilege. The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

Ethical Duty of Confidentiality

A model of the ethical duty of confidentiality rule is set forth in the Model Rules of Professional Conduct. Most states have a similar version of the Rules of Professional Conduct. The ethical duty of confidentiality found in the Rules of Professional Conduct is larger in scope than the attorney-client privilege.

Model Rule 1.6, entitled "Confidentiality of Information," provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation. The rule also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. The duty of confidentiality encompasses all information relating to the representation.

Under the rule, unauthorized disclosure is permitted only in specific circumstances, such as to prevent death or bodily harm, to prevent a crime or fraud, or to comply with law or court order. Unlike the attorney client privilege, the ethical duty of confidentiality is not an evidentiary matter and may not serve as a basis to resist a court's order to disclose information otherwise protected under the rule. Similar to the attorney-client privilege, information protected under the rule remains confidential and that protection survives the termination of the lawyer-client relationship and even the death of the client.

On occasion the trial lawyer will have to deal with a conflict between his duty of candor to the court and his duty of confidentiality to the client. When that occurs, it is critical to know that candor to the court trumps the rule requiring confidentiality to the client.

The Attorney-Client Privilege

In 1981, the United States Supreme Court extended the attorney-client privilege to in-house counsel. *Upjohn Co. v. United States*, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981). The issue in *Upjohn* was whether, in the corporate context, the attorney-client privilege included communication between the attorney and low level employees of the corporation. The Supreme Court held that any information obtained by a corporate defendant's attorney that is sought for purposes of legal advice is protected by the attorney-client privilege. The client is not just the ranking officers of the corporation, but includes any employee from whom information is sought.

Significant is the fact that corporate counsel does not have the same capacity as outside counsel to have privileged communications with clients. The problem is that courts do not treat a communication as privileged simply because it was made by or to a person who is an attorney. A communication is privileged only if the primary purpose of the communication is to further the objectives of the attorney-client privilege. In other words, the communication must be made for the purpose of seeking, obtaining or providing legal assistance. Specifically, the attorney- client privilege protects communications between a lawyer and a client when the communications are 1) made for the purpose of seeking or providing legal advice, as opposed to business advice; 2) confidential when made; and 3) kept confidential by the client.

Who Is the Client?

It is generally recognized that not all corporate employees are the "client." Model Rule 1.13(a) states that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." An organizational client cannot act except through its officers, directors, employees, shareholders and other constituents.

The ethical duty of confidentiality of Rule 1.6 applies when one of the constituents of an organizational client communicates with the organization's lawyer in that per-

son's organizational capacity. The Comments to Rule 1.13 provide the following example: if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

With respect to the attorney-client privilege, the scope of the privilege is unique when an attorney represents a corporation. Courts have employed two theories to decide which corporate employees in-house counsel may communicate with in a privileged context.

One theory is the "control group test" under which only those conversations between in-house counsel and the corporation's controlling executives and managers are eligible for protection. Often, a company's "control group" is made up of a very limited number of corporate employees.

In *Upjohn*, *supra*, the Supreme Court expanded the control group test to include an inquiry into the subject matter of the communication. Under this theory, employees with relevant information regarding the subject matter are considered the "client" regardless of their position in the company. Therefore, it is possible for any corporate employee to have a privileged conversation with corporate counsel. However, the conversations are not always privileged. Issues arise because often many corporate employees are under the impression that they can discuss any corporate legal matter with a corporate attorney and it will be privileged. Not every corporate employee is entitled to a privileged communication on every legal matter. Unless the communication is within the scope of the employee's responsibility, it is not privileged. Further, some employees may be outside the scope of the privilege as to any legal matters. Issues arise when these employees attend meetings where corporate counsel gives legal advice.

Not all jurisdictions use the expanded test in *Upjohn*, some continue to employ the control group test.

Reporting of Internal Wrongdoing

Issues of confidentiality arise when it comes to laws requiring reporting of wrongdoing. Section (b) of the Rule 1.13 provides, "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization." The issue of confidentiality is affected by this rule. Counsel must determine whether or not reporting under this rule is permitted. This creates a significant ethical dilemma. In addition, the Sarbanes-Oxley Act of 2002 imposes an increased duty on corporate counsel to communicate wrongdoing to corporate authorities, an act which may be in conflict with the confidentiality rules.

Legal Advice vs. Business Advice

Most in-house attorneys have dual legal and business roles and some hold corporate titles such as Vice President or Secretary, in addition to the title of General Counsel. This dual role can cause ethical conflicts. Often corporate legal advice involves at least some element of business advice; as a result, in-house counsel faces more scrutiny when it comes to applying the attorney-client privilege. Generally, communications made by and to an in-house counsel with respect to business matters or business advice are not protected by the attorney-client privilege.

To invoke the attorney-client privilege, the communication must be primarily for the purpose of rendering legal advice. It is inevitable that legal advice is often intertwined with business advice. Some courts have approved redaction or exclusion of privileged portions of documents containing legal advice mixed with business issues.

Courts have held that there is a need for this heightened scrutiny when it comes to applying the attorney-client privilege to corporate counsel because of the chance that an attorney may participate simply to be able to assert the privilege and keep the documents off limits in discovery. Therefore, courts must often distinguish between a lawyer's legal and business work.

Further, the fact that counsel is carbon copied on a document or attends a meeting, does not invoke the privilege. Typically, the privilege does not apply under these circumstances unless it can be demonstrated that the communication would not have been made but for the client's need for legal advice. If the purpose of the communication is not for the primary purpose of obtaining legal advice, it does not become privileged by adding counsel as recipients. Additionally, counsel's recommendation of, or

involvement in, a business transaction does not necessarily place the transaction under the cloak of privilege.

Preserving the Attorney-Client Privilege

Communications subject to the attorney-client privilege remain protected unless the client affirmatively waives the privilege or it is indirectly released by the client's actions. The privilege which applies to information shared in representation of the corporation cannot be waived by an individual officer, director or employee without the proper authority.

While in-house counsel may communicate with any employee or agent of the corporation about their work as necessary to render legal services for the corporation, counsel must ensure the attorney-client privilege is preserved.

Thomas Paschos is a nationally recognized attorney in the field of professional liability, employment litigation, insurance coverage, products liability, and complex commercial litigation. He represents, amongst others, corporate officers, physicians, dentists, nursing homes, lawyers, accountants, product manufacturers, insurance agents and brokers, architects and engineers, contractors, and insurance companies. He has been awarded an AV rating with Martindale-Hubbell. He is the managing partner of Thomas Paschos & Associates, P.C., with offices in Haddonfield, NJ and Philadelphia, Pennsylvania. The firm is a member of the International Society of Primerus Law Firms, and Tom is the Co-Chairman of the Professional Liability Practice Group, and also serves on the Executive Committee of Primerus' Employment and Labor Group. Also, he is currently the chair for the Lawyer's Professional Practice Group of the Professional Liability Defense Federation. Tom is a graduate of Temple University School of Law, where he received his J.D. in 1985, and L.L.M. Trial Advocacy in 1998, and Drexel University, where he received his B.S. in 1982. He is admitted to practice in the federal and state courts of Pennsylvania and New Jersey, as well as the U.S. Supreme Court.

Privilege and the In-House Counsel: Protecting Your Communications Through Proper Registration and Careful Understanding of the Privilege

By Vincent J. Syracuse and Amy S. Beard

In-house counsel—those lawyers who are employed by a non-governmental entity that is not itself engaged in the practice of law, and who provide legal services only to that entity and its organizational affiliates—play a unique role in the provision of legal services, often acting as both legal counsel and business advisors to their employers. Because of their singular position in the legal world, the rules governing in-house differ in important ways from those governing independent counsel, particularly rules governing their registration to practice in this state and preservation of the attorney-client privilege.

Registering to Practice as In-House Counsel in New York State

Prior to April 20, 2011, New York was among a handful of states that did not offer a provisional license or registration option to in-house counsel, which meant in-house counsel employed in New York were required to be admitted to practice in New York through the bar examination or reciprocity. Given the interstate and cross-border nature of so many companies today, it should come as no surprise that some in-house counsel, admitted to practice in other jurisdictions but working for employers in New York, "flew under the radar," acting as in-house counsel to their employers without actually being admitted to practice in New York. This practice exposed such counsel to possible disciplinary action for the unauthorized practice of law and created a risk that the attorney-client privilege in legal communications between the counsel and the employer would be lost.

Last year, at the urging of the NYSBA's House of Delegates, the New York Court of Appeals adopted a new rule, Part 522, which offers in-house counsel a means through which they can apply for registration as in-house counsel. Though not admitted to practice in New York, once registered, in-house counsel may practice law in New York within the confines permitted for in-house counsel—that is, they may provide legal advice and services to their employer and the employer's affiliated entities, so long as the employer is not itself engaged in the practice of law.

In an important concession to out-of-state in house lawyers, Part 522 does not force applicants to satisfy all the requirements of an applicant seeking admission to the New York state bar by examination or through reciprocity. Instead, applicants must submit to the clerk of the Appellate Division in which they practice or live proof of their (a) admission to practice in another state or the District of Columbia, (b) current good standing in any jurisdiction that would allow an attorney admitted in New York to practice as in-house counsel, and (c) good moral character. The specific proof a registration applicant must submit has four parts:

> (1) A certificate of good standing from each jurisdiction in which the applicant is licensed to practice law;
>
> (2) A letter from each such jurisdiction's grievance committee certifying whether charges have ever been filed by the committee against the applicant and if so, what the charges were and how they were resolved;
>
> (3) An affidavit from the applicant certifying that he or she (a) only provides legal services to the applicant's employer or its organizational affiliates and to employees, officers, and directors of the employer, but only on matters directly related to the applicant's work for the employer entity and to the extent consistent with the New York Rules of Professional Conduct, (b) will not appear before any tribunal in New York state or engage in any activity for which *pro hac vice* admission would be required, (c) will not provide any personal or individual legal services, (d) will not hold him- or herself out as an attorney admitted to practice in New York state except on the employer's letterhead with a limiting designation, and (e) agrees to be subject to the state's disciplinary authority and Rules of Professional Conduct; and
>
> (4) An affidavit from the applicant's employer certifying that the applicant is or will be employed as counsel for the

employer and that the employment conforms to the requirements of Part 522.

Once registered, in-house counsel are required to maintain their status as an active member in good standing with at least one U.S. state, territory, or the District of Columbia and, it should go without saying, to abide by all the laws and rules that govern attorneys admitted to practice in New York. This includes complying with the appropriate biennial registration requirements for New York attorneys. In-house counsel are also required to notify their Appellate Division if any disposition is made in a disciplinary proceeding against them in another jurisdiction.

All in-house counsel employed full-time in New York as of Part 522's effective date, April 20, 2011, were required to apply for registration within 90 days of the effective date. Any attorneys who became employed as in-house counsel after Part 522's effective date have 30 days from the commencement of employment to apply for registration.

Failing to Register to Practice Carries Dangerous Risks

Failure to register has potentially disastrous consequences. First, practicing law within the state without being either registered or admitted constitutes unauthorized practice of law. This exposes the lawyer to disciplinary action under New York Rule of Professional Liability 5.5, criminal liability under New York Judiciary Law Section 478, and possibly disciplinary action pursuant to the rules of professional conduct in the jurisdiction in which he or she is admitted, as well.

Second, in-house counsel who fail to register but nonetheless engage in the practice of law may torpedo both the work-product protection for any legal work in which they engage and the attorney-client privilege that would otherwise protect legal communications between the employer and the employer's counsel. Although the law on this issue is unclear, even a minimal risk that a court would find that no privilege or work-product immunity applies because the in-house counsel was not registered or admitted in New York while offering legal advice or creating work product here is a second excellent incentive to register.

While the law is clear that a legal professional must be admitted to a state or federal bar for the privilege to apply, it is uncertain how the courts will treat privilege when the legal professional giving advice is located in, but not authorized to practice law in, New York. Cases involving attorneys barred outside the United States suggest that the courts will engage in a conflicts-of-law analysis to establish what jurisdiction's law should apply to the determination of privilege. If a court determines that the "center of gravity" of the communications is New York, and the only legal professional involved in the communication was not registered or admitted in New York, it is possible the court will find that the attorney-client privilege does not apply because that lawyer was not authorized to practice in New York. Likewise, if the center of gravity of work product produced by an in-house counsel is New York, but that in-house counsel is neither registered nor admitted here, the court may find that the work product is not immune from discovery.

Because no New York court has ruled on these specific issues, the answers are uncertain, but no in-house counsel should run the risk of destroying the attorney-client privilege or work product immunity by failing to apply for registration with the appropriate Appellate Division.

Registration Does Not Resolve All Complications Associated With Attorney-Client Privilege and Work Product

While registration will eliminate the risk that an in-house counsel in New York will face disciplinary action for the unauthorized practice of law, it does not ensure that every communication the counsel has with his or her employer is protected by the attorney-client privilege, nor that every document created by counsel is immune from discovery as work product. Because in-house counsel, due to their multi-faceted duties within their employer companies, may provide their employers with advice on a variety of non-legal issues and create a variety of documents that do not contain legal analysis or strategy, it is important for in-house counsel to understand the intricacies of the rules governing privilege and work product to ensure the protections will apply when they are needed.

Attorney-client privilege only attaches to confidential legal communications—specifically, those communications made for the purposes of requesting or providing legal advice. It does not attach to the facts underlying legal advice, to communications regarding strictly business (as opposed to legal) services, or to any communications that are, or are intended to be, made available to any third party. The mere presence of an attorney in a communication does not ensure the communication is privileged. Only communications that are made and kept in confidence and with the primary purpose of giving and receiving legal advice will fall under the umbrella of attorney-client privilege. Under the New York Civil Procedure Law and Rules ("CPLR"), privileged material is immune from discovery.

It is a common misconception that simply copying in-house counsel on an email will protect it from discovery as a privileged document. It is also often thought that if an attorney is not copied on a document, it cannot be privileged. Both ideas are false, however. To determine whether a document is privileged, courts will look to whether the primary purpose of the document was the requesting or providing of legal advice.

For example, in a communication between company executives and in-house counsel, was the attorney weighing in with business advice or offering legal counsel? An in-house counsel's recommendation not to approve a franchisee because the proposed store location is unlikely to be profitable is business advice and not privileged, but in-house counsel's advice not to approve a franchisee because the franchisee has a history of suing former business partners and could pose a litigation risk to the company is legal advice and privileged. Similarly, a document created primarily for business purposes, such as in-house counsel's notes of a meeting regarding the status of certain business transactions, would not be privileged, but a document created primarily for legal purposes, such as in-house counsel's notes of a meeting regarding strategies for avoiding litigation with respect to a particular transaction would be privileged.

If no attorney was copied on the communication, it may nonetheless be privileged if the primary purpose of the document involved giving or receiving legal advice. Were the parties to the communication company employees who were discussing legal advice received from in-house counsel? Were they weighing some different actions and discussing what items needed in-house counsel's input before a decision could be made? Were they gathering facts as part of an investigation by in-house counsel? Documents fitting these descriptions may well fall within the attorney-client privilege even if no attorney was copied on them.

If a document or communication is not made and kept in confidence, privilege either will not attach or will be destroyed, depending on the circumstances. For example, in-house counsel's statements during a meeting with the counterparty to a lease cannot be privileged because they are not confidential. Similarly, if in-house counsel offers legal advice to the CEO about a business venture, and the parties initially intend that advice to remain confidential, attorney-client privilege attaches, but if the CEO later decides to include the contents of that communication with a press release, the privilege will be destroyed.

Work product is distinguishable from privileged material. Like privileged material, work product must be made and kept in confidence, but unlike privileged material, the primary purpose behind it is not legal advice, but legal analysis, strategy, or opinion. The CPLR and Federal Rules also shield work product from discovery.

The key to determining whether a document constitutes work product is whether its contents reflect or involve a lawyer's learning and professional skills. A straightforward report of a meeting, describing who was present and what was said, but no more, does not require a lawyer's education or training to create and thus would not constitute work product, even if in-house counsel created it. If, however, the report also contained legal analysis, the report—or, at the very least, those portions containing that analysis—would be protected work product. For example, if in-house counsel attended a meeting with department heads and human resources personnel to discuss employee evaluations, promotions, and recommended terminations, and after the meeting, in-house counsel wrote a report describing not only what was said during the meeting, but discussing possible legal ramifications of implementing the promotion and termination decisions discussed and how to reduce the likelihood of litigation following employee terminations, the report would constitute work product.

Privilege and work product issues can be complex, and in-house counsel should continue to educate themselves on what can and cannot be protected from discovery through these doctrines.

Conclusion

In-house counsel practicing in New York should be aware of potential pitfalls in their practice, particularly the risks of failing to register or to maintain registration as in-house counsel and the complexities of the attorney-client privilege and work product doctrines. While proper registration will avoid the possibility that all of the in-house counsel's communications and documents will be discoverable, in-house counsel must still educate themselves on exactly what constitutes work product and privileged material in order to ensure that documents containing legal advice, opinions, and strategy are properly protected.

Vincent J. Syracuse is the Chair of the Litigation and Dispute Resolution Department at Tannenbaum Helpern Syracuse & Hirschtritt LLP in New York City. He is a former Chair of the Commercial and Federal Litigation Section of the NYSBA.

Amy S. Beard is a litigation associate at Tannenbaum Helpern Syracuse & Hirschtritt LLP.

Ethical Obligations Regarding Inadvertently Transmitted E-Mail Communications

By Eric M. Hellige

On a daily basis, with a click of the mouse, hundreds of e-mails are exchanged between attorneys and their clients. Much of this traffic constitutes harmless correspondence, but often the content of the e-mail includes sensitive, confidential or privileged information. Occasionally, in the constant stream of e-mail exchange, an e-mail will inadvertently be sent directly or copied to the wrong party. This situation presents a serious concern for attorneys charged with maintaining their own confidentiality, as well as that of their clients. Despite how regularly these circumstances arise, there is no clear consensus among the relevant rules of professional conduct or the ethics opinions interpreting the rules on attorneys' ethical responsibilities regarding inadvertently sent or received e-mails, nor does the case law provide consensus concerning any use the recipient may make of inadvertently received e-mails, or their impact on the waiver of attorney-client privilege. As a result, attorneys face a conundrum when they receive inadvertently disclosed e-mails. This article presents attorneys practicing in the State of New York with some basics that will enable them to better deal with inadvertently transmitted communications.

Historical Development

In 1992, the American Bar Association (the "ABA") Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 92-368, "*Inadvertent Disclosure of Confidential Materials*," which provided that

> [a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them.[1]

However, the ABA Model Code of Professional Responsibility (the predecessor to the ABA Model Rules of Professional Conduct) provided no real basis for the duties imposed in ABA Formal Op. 92-368. In fact, ABA Formal Op. 92-368 was deigned to admit that "[a] satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the [ABA] Model Rules."[2] As a result, the ABA Committee explained that it had derived these duties from five main principles:

> (i) the importance the [ABA] Model Rules give to maintaining client confidentiality, (ii) the law governing waiver of the attorney-client privilege, (iii) the law governing missent property, (iv) the similarity between the circumstances here addressed and other conduct the profession universally condemns, and (v) the receiving lawyer's obligations to his client.[3]

Following the issuance of ABA Formal Op. 92-368, New York weighed in with its responses. The New York County Lawyers' Association Committee on Professional Ethics issued Formal Opinion 730, "*Ethical Obligations Upon Receipt of Inadvertently Disclosed Privileged Information*," in 2002, which basically reiterated Formal Op. 92-368.[4] In 2003, the Association of the Bar of the City of New York (the "ABCNY") Committee on Professional and Judicial Ethics issued Formal Opinion 2003-4, "*Obligations Upon Receiving a Communication Containing Confidences or Secrets Not Intended for the Recipient*," which concluded that

> a lawyer receiving a misdirected communication containing confidences or secrets (1) has obligations to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested, but, (2) in limited circumstances, may submit the communication for in camera review by a tribunal, and (3) is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains confidences or secrets not intended for the receiving lawyer. However, it is essential as an ethical matter that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.[5]

In reaching this conclusion, ABCNY Formal Op. 2003-4 backed away from absolute imposition on lawyers of the duties outlined in ABA Formal Op. 92-368. In 2004, the New York State Bar Association (the "NYSBA") Committee on Professional Ethics, in Opinion 782, "*E-mailing*

Documents That May Contain Hidden Data Reflecting Client Confidences and Secrets," described the standard of care lawyers should follow when using e-mail communication, stating that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication…[t]he extent of [which] var[ies] with the circumstances."[6]

Addressing the Confusion

For many years, confusion remained as to whether the three duties set forth in ABA Formal Op. 92-368 were appropriate statements of professional responsibility to which lawyers must adhere. As a consequence, in the last major revision of the ABA Model Rules of Professional Conduct, the ABA adopted new rules governing inadvertent disclosure. ABA Model Rule 1.6(a), "*Confidentiality of Information*," prevented attorneys from revealing information about a client without consent and required them to protect confidential client information.[7] Comments to the rule required lawyers to safeguard client information from inadvertent or unauthorized disclosure, and to take reasonable precautions to prevent information from reaching unintended recipients.[8] ABA Model Rule 4.4(b), "*Respect for Rights of Third Persons*," reduced the ethical duties imposed on attorneys who receive inadvertent e-mails, leaving only the duty to notify the sender of the inadvertent transmission.[9] As a result of that change, in 2005, the ABA Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 05-437, "*Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (November 10, 1992)*," withdrawing its previously expressed opinions in ABA Formal Op. 92-368.[10]

Despite the ABA's adoption of rules governing inadvertent disclosure, the New York Lawyer's Code of Professional Responsibility, which governs the conduct of New York attorneys, lacked provisions expressly governing inadvertent disclosure until 2009. State courts and ethics committees struggled with how to deal with such situations, and a body of law developed to expressly address such issues. However, the New York Rules of Professional Conduct, which became effective on April 1, 2009, attempted to rectify this gap by including a provision that specifically addressed inadvertent disclosure. New York Rule 4.4(b), "*Respect for Rights of Third Person*," states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[11] Given the brevity of New York Rule 4.4(b), the comments to the rule, which specifically provide that the term "document" includes any electronically stored information that can be read (including e-mails), are more helpful in providing guidance to attorneys. The comments state as follows:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] [Rule 4.4(b)] recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail and other electronically stored information subject to being read or put into readable form.

[3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the docu-

> ment to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer.[12]

Addressing the same issue two years later under the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011, the ABA Standing Committee on Ethics and Professional Responsibility issued two opinions that address attorneys' ethical obligations concerning inadvertently disclosed correspondence under the ABA Model Rules.

ABA Formal Opinion 11-459, "*Duty to Protect the Confidentiality of E-mail Communications with One's Client*" explains that lawyers have a duty to warn clients about the risks of sending or receiving electronic communications where there is a significant risk that an employer or third party may gain access to privileged e-mail correspondence.[13] As a general rule, the ABA explains, lawyers should advise clients about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, and warn the client against discussing their communications with others. A lawyer should also instruct the client to avoid using an employer-issued computer, telephone or other electronic device to receive or transmit confidential communications. Despite e-mail becoming a common replacement for letters and in-person meetings, e-mail communications without safeguards can be just as risky as having a confidential face-to-face conversation in a setting where it can be overheard.[14]

The ABA also points to various factors that tend to establish an ethical duty on the lawyer to protect client-lawyer confidentiality by warning the client against using business devices for communications with their own counsel. Clients should be warned if (i) they have engaged in, or indicated an intent to engage in, e-mail communications; (ii) their employment provides access to workplace communication devices; (iii) given the circumstances, the employer or other third party has the ability to access e-mail communications; or (iv) as far as the lawyer knows, the client's employer's policies and the jurisdiction's laws do not clearly protect those communications.[15]

ABA Formal Opinion 11-460, "*Duty When Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel*," explains that when an employer's lawyer receives copies of an employee's private communications with counsel, ABA Model Rule 4.4(b) does not require the employer's lawyer to notify opposing counsel of the receipt of the communications.[16] With ABA Formal Op. 11-460, the ABA has provided a clear distinction for dealing with inadvertently received communications based on how they were disclosed to the unintended recipients. In the case of a communication that is inadvertently sent to an unintended recipient by one of the parties to the communication, ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly."[17] However, when the communication has been retrieved by an unintended recipient from a public or private space where it is stored, such as in the context of an employer's access to an employee's files, then the ABA opines that ABA Model Rule 4.4(b) does not require the third party to notify opposing counsel of the receipt of the communications.[18]

It is important to note that the ABA Model Rules and the ABA formal opinions are not binding, and merely provide guidance to the states regarding the ABA's position on the rules of professional conduct, and how to interpret those rules. Therefore, attorneys should pay attention to developments on ethical issues in the state laws, ethical rules and case law of their local jurisdiction.

Current Expectations of Professional Conduct

To review, the following are the current positions of the ABA and the State of New York of which every lawyer should be aware when he or she receives an inadvertently disclosed e-mail:

ABA

Sender's Duty When Transmitting E-mails

The sender has no explicit duty regarding the sending of e-mails. A lawyer's general duties with regard to the confidentiality of client information under ABA Model Rule 1.6 apply to e-mail communications as well.[19]

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. Under ABA Model Rule 4.4(b), a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[20] However, ABA Formal Op. 11-460 clarifies that ABA Model Rule 4.4(b) does not impose notification obligations on lawyers that retrieve inadvertently disclosed communications from a public or private sphere, rather than receiving them from a specific sender.[21]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. ABA Formal Op. 05-437 states that although ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly," it "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."[22]

New York

Sender's Duty When Transmitting E-mails

NYSBA Op. 782 notes that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances."[23] The extent of reasonable care varies with the circumstances.

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. ABCNY Formal Op. 2003-4 concludes that an attorney who receives a communication and is exposed to its contents "prior to knowing or having reason to know that the communication was misdirected ... is not barred, at least as an ethical matter, from using the information," but also states that "it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure."[24]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. The comments to New York Rule 4.4(b) state that while "refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address" honors the policy of the Rules, since there may be "circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, [the] Rule does not subject a lawyer to professional discipline for reading and using that information."[25] The comments to New York Rule 4.4 do, however, warn lawyers to take into account any applicable law or rules before reviewing inadvertently received e-mails. In the absence of such law or rules, "decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer."[26]

Endnotes

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).
2. *Id.*
3. *Id.*
4. NYCLA Comm. on Prof'l Ethics, Formal Op. 730 (2002).
5. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
6. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
7. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
8. Model Rules of Prof'l Conduct. R. 1.6 cmt. (1983).
9. Model Rules of Prof'l Conduct. R. 4.4(b) (1983).
10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
11. NY Rules of Prof'l Conduct. R. 4.4(b) (2009).
12. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
13. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011).
14. *Id.*
15. *Id.*
16. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
18. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
19. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
20. Model Rules of Prof'l Conduct. R. 4.4(b) (1983).
21. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
22. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
23. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
24. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
25. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
26. *Id.*

Eric M. Hellige is a partner at Pryor Cashman and can be reached at ehellige@pryorcashman.com. Durre S. Hanif is an associate at Pryor Cashman and can be reached at dhanif@pryorcashman.com.

Social Media and Attorney Ethics, There's an App for That

By Natalie Sulimani

Social networking. It's a wonderful thing. It allows us to keep in touch with friends, both old and new. Through it we can keep abreast of important, and maybe not so important, news. Social networking even helps us to save money in these challenging times. So what's not to like? Even the most world-weary lawyers are beginning to see the value of social networking in marketing, networking and most importantly representing their clients. Sounds even better…but wait. Even in the realm of social networking, one must still be aware of the ethical considerations. The media might be new, but the tried and true rules of professional conduct still apply and will help you avoid any legal pitfalls.

Therefore, let's take a look at some situations that arise in the realm of social networking and explore the ethical considerations that may arise therein.

First, let's consider a situation where you are representing a client. As the attorney, you want to be able to utilize any and every tool at your disposal to get the best outcome for your client. This can entail varying degrees of research on the other party, as well as research on potential jurors. This can be time-consuming and costly using traditional methods. However, by using information gathered through social networking channels, your job has been simplified. It is almost as if you have access to a spyglass on all of these people. However, the big question is whether you can use this information and, if so, how can you *ethically* obtain this information?

Throughout the country, bar associations have been struggling with these and other such questions dealing with social networking and have answered them in various ways. However, for the sake of this discussion, let's focus on how New York has dealt with them.

The New York State Bar Association opined in September 2010 that any information you obtain through a public page is fair game. That is to say, any page that may be accessed without a password or any other way being "friended." The page is fully accessible to anyone surfing the net. The attorney is neither contacting a represented party nor gaining access to the person's personal page through false pretenses or otherwise. As an example of the opposite, imagine an attorney who would seek to have access to the opposition's, or a potential witness for the other side's, social network site that would require private access. The attorney or some other agent in that office poses as an interested member or maybe even acquaintance of that party and asks to be "friended" or other such privilege. This is not a public situation because the other party must grant permission for access to certain information. However, where this is not the case, you may consider the information you find through social networking as a public page. It's as if the lawyer obtained the information out in the open, in a public space without expectation of privacy. Given this knowledge, let's pause for a moment while you check the privacy setting on your Facebook page. (NYSBA Opinion #843).

The New York County Lawyers' Association, however, takes the public social networking page one step further and extends its analysis to situations with jurors. NYCLA recognizes that a lawyer may visit public social networking sites such as Facebook or a Twitter page of the juror before trial in obtaining information about a potential juror, but what about situations of continuous monitoring of a juror? Could such a thing be ethical? Let's look at what the traditional view has been. The Rules of Professional Conduct prohibit communications with a juror during trial unless authorized by court order and, in certain situations, even after the case has been discharged. So, does is this the standard still apply in our virtual world of social networking? Would subscribing to a juror's blog or Twitter feed be considered, in this traditional sense, an impermissible communication? And, moreover, if it is and you find impropriety on the juror's part, what about the obligation to report this juror misconduct as revealed by "following" that juror online? NYCLA considered these situations and in its opinion concluded that while it is proper and ethical to use online resources to perform research on a potential juror, it drew the line at attempting to "friend" jurors or otherwise try to "connect" with them even by simply subscribing to their blogs or Twitter feeds. However, it also concludes that there still is an ethical obligation to report any juror misconduct if it is known to you. This opinion, therefore, creates an interesting paradox as it leaves one to wonder how a lawyer may happen upon juror misconduct if the lawyer is prohibited from "following" the juror online, but yet if the lawyer happens to overstep the bounds of ethics somehow and discover this misconduct, he or she must report it, which would thereby open the lawyer up for ethical violations. Something of a "don't ask, don't tell" conundrum…. It should be interesting to see how this opinion plays out in the future.

Now, it is quite another story when you are trying to obtain information on another party's / witness's personal page, so let us backtrack to this situation. The rule here is basically FRIENDS ONLY. Here, a lawyer may not gain access to a social networking website under false pretens-

es either directly or through an agent. The most important part of this opinion is "*under false pretenses.*" The New York City Bar Association opinion goes into a scenario where the attorney or agent would create a fictitious profile based on the targeted person's hobbies, alma maters, jobs, etc, in the hopes that the common interests would induce the targeted person to accept a friend request. It does not matter if it is the attorney or a secretary or paralegal of the firm, this is exactly the kind of behavior that is prohibited because it issuing a false pretense, i.e., you are a member of the public with no legal interest in the targeted person, to gain access to that person's social networking page or accounts. However, the NYC Bar Association does allow and, in fact, urges informal discovery through such means as friending an unrepresented party truthfully, with full disclosure, or through more formal routes, such as discovery. Therefore, given these legitimate avenues, there should be no reason to resort to trickery that would endanger you or your client's case. (ABCNY Opinion 2010-2).

Until now, we have discussed the various methods in which an attorney may gather information about other parties and jurors. The other very intriguing issue faced by attorneys these days is their own conduct on social networking sites. After all, attorneys use social media personally and professionally.

In the case where an attorney or law firm uses social networking as a way to market the practice, the traditional attorney advertising rules still apply. After all, regardless of the medium, it can and should be considered advertising or a solicitation. In the following sections, I will discuss the biggest mediums for social networking, Twitter and Facebook, and then will end the article with the newly approved advertising through Groupon.

Let's first consider Rule 7 of the Attorney Rule for Professional Conduct, which outlines attorney advertising. However, given the fast pace of the Internet, it may seem burdensome or difficult to abide by these guidelines. Therefore, a good practice is to use your firm's website, which is already compliant, as the underlying platform for any advertising you may do online.

When setting up your social media for online advertising, you must first decide on your "handle" (in the case of Twitter) or username. This is an important decision because the Rules provide that you may not choose a name that may be misleading or promise a particular outcome. It is a similar consideration to choosing a vanity domain name. While you may choose a domain name like "newyorkmatrimonialattorney.com," your website has to indicate the firm name, partners, address, etc., as limited by the rules governing New York attorneys. So, when choosing your handle or username, while your firm name or personal name may be appropriate, be careful if you choose to use a name like "facebook.com/quickiedivorce" as this might create an expectation that the divorce cases you handle are, indeed, expeditiously handled. As far as I am aware, you cannot put a disclaimer in your handle or username that prior results do not guarantee outcome to escape an advertising infraction.

Once you have chosen your name and signed up for the account, your next step is usually a description of who you are, what your firm does, etc. Obviously, since you are setting up a social media account for marketing, this message is very important. Generally, when embarking on a social media campaign, you want your message to be unified and cohesive. To comply with the Rules, it should neither contain statements that are deceptive or false nor should it reference yourself as an "expert" unless you do, in fact, fall into that narrow category, e.g., passed the Patent Bar.

The next step is usually peer or client recommendations. Here you must pay particular attention to posting the disclaimer "Prior Results Do Not Guarantee Outcome," and should the recommendation come from a client, he or she must consent in writing that you can publish the recommendation. After all, attorney-client privilege is paramount and a foundational concern for all social media. So a good rule of thumb is to get any client's consent in writing if you even contemplate using a party's recommendation, and moreover, make sure that this party is fully aware of what consent means. Review all recommendations and make sure they accurately portray what you did for the testimonial parties. Of course, a testimony cannot be provided for a matter still pending. After all, it is *our* duty as lawyers to adhere to the Rules, we cannot expect the client to know.

In the case of LinkedIn, the username is usually not at issue since LinkedIn should be considered your online resume or CV. As such, by default, you will always use your name for your profile. However, a potential pitfall in LinkedIn is filling out the expertise section of your profile. According to the Rules, you cannot call yourself an expert unless you have specific credentials, e.g., passed the Patent Bar. So, I would suggest skipping this section altogether and instead fill out the "Skills and Expertise" section.

Now you are ready to begin the task of marketing yourself through social media, or to a lesser extent just interacting with the social stratosphere at large. However, it is vital that you keep in mind and guard against not making representations that will cause unrealistic expectations or provide a false impression. Usually, this takes the form of excited utterances after a great win. Or, perhaps more often, you had a bad day at court and you feel the

need to exorcise the beast by Tweeting to the world what a <&*%*^*$> the judge was. DANGER! Attorneys cannot speak ill of a judge in public. Your reputation is still on the line and being scrutinized even if you have a clever handle that you think no one will trace back to you…they will!

Cooler heads should always prevail, especially in social networking. It is always best to simmer on anything you put out there in social media of any form. The worst of human nature goes viral fast and stays online forever. LinkedIn aside, there is no delay and like a bad marketing campaign, it will make its rounds around the world and back before you can even begin to deal with the backlash.

So, what are good rules of thumb in embarking on a social media campaign to market yourself, your practice or the firm you work for?

- Familiarize yourself with the Rules;
- Read up on the various opinions;
- Pick a username/handle that does not disguise who you are;
- Do not embellish your description of yourself and your practice, make sure you can back up your assertions;
- Advise your clients about your use of their recommendations;
- Edit the recommendation if you have to; and
- Make sure you route back to your website.

While these tips are by no means exhaustive, referring back to your website might be the most powerful way to adhere to the guidelines. The FTC issued guidelines regarding truth in advertising, which prompted a lot of bloggers to start using a service called CMP.LY. This is a short URL at the end of paid-for Tweets that allows bloggers to disclose their vested interest. It is a wonderful answer to the 140 character limitation, but as of the date I wrote this article, this doesn't seem to include attorney advertising. Having said that, it would be a fantastic tool to recommend to your clients. In the end, the answer to avoid problems is to route your tweets, status updates, etc. to your site where you have enough real estate to disclose what you need to disclose such as:

- Attorney Advertising which is prominently displayed on your website; and
- Prior Results Do Not Guarantee Outcome, especially if you are talking about a recent win.

Finally, let's talk about Groupon. Since I have discussed this on various panels, I am familiar with that glaze that must be falling across your face as you read this, but in truth, it is probably no different than when attorneys started advertising on TV. While this may not suit many of you, it can be a great tool and, indeed, has worked for a handful of brave attorneys who were willing to try.

In a recent opinion (12/13/11), the New York State Bar Association weighed in on marketing legal services through a daily deal site. Essentially, the opinion stated that an attorney may offer his or her services through a daily deal site provided the advertising is not misleading or deceptive and that the attorney makes clear that there is no relationship formed until the proper checks are performed. If the lawyer is unable to provide services, a full refund must be made. If the client terminates representation the refund is subject to the quantum meruit claim. The opinion is interesting and goes into greater detail of a non lawyer receiving a referral fee since the website is taking a fee for the advertising. In that case NYSBA opines that the website is taking a fee for advertising and the website has no individual contact with the client. What I think is also interesting to think about if you do decide to advertise on a daily deal site is what you would do if your campaign is successful. I have seen businesses turn to Groupon as the answer to their cash flow only to be shut down faster due to the demand that they couldn't satisfy. What are the implications of referring those potential clients. When would that disclosure need to be made? Also, Rule 7.1 provides specific guidance regarding disclosures of fees and the attorney may be bound by these rates for no less than 30 days after broadcast. All considerations when embarking on any advertising campaign.

This is just the beginning of many opinions regarding attorney ethics and social media and the tips above are by no means exhaustive. So, when in doubt, check your local rules, utilize the Ethics Hotlines available through your bar association, and download the NYSBA Mobile Ethics App to your phone or tablet. But, fear not social media; it is certainly not going anywhere.

Natalie Sulimani is a partner at Sulimani Law Firm, a member of the Executive Committee of the Corporate Counsel Section and Co-Chair of the Technology and New Media Committee of the Corporate Counsel Section. She can be reached at Natalie@sulimanilawfirm.com.

Alliance Bernstein to Host 7th Annual Kenneth G. Standard Diversity Internship Reception Summer 2012

Since 2006, the Section will have placed 40 summer interns in-house after this summer. Last year, Pryor Cashman law firm hosted the reception for eight interns from eight different New York law schools. Host entities were FINRA, which hosted a student every year since the inception of the program, Pepsi, Con Edison of New York, United States Tennis Association, Alliance Bernstein and In Motion.

Each year, our Section fully funds a not-for-profit student. For 2012, we expanded that effort by creating the Corporate Counsel Section Fellowship Fund with the New York Bar Foundation to allow two students this year to be placed in-house in a public interest legal or charitable organization. Interested hosts in 2013 should apply for a grant before October 1st at www.tnybf.org.

Each year our Section provides $3,000 for three students toward the compensation of a student at a corporation. We are often able to place more than three students each year as many organization like Con Edison of New York and Alliance Bernstein fully support the student's compensation. For the three students, we ask the corporation to provide at least another $3,000 for a minimum compensation of $6,000 for the student for the summer. Many corporations will provide the student more than the minimum. If you are interested in hosting for 2013 please contact david.rothenberg@gs.com.

The hosts for 2012 are Con Edison of New York, Pitney Bowes, Pepsi, FINRA, NYSTEC and Alliance Bernstein.

Past hosts have been Pfizer, New York Power Authority, The Institute for Conflict Prevention & Resolution, McGraw-Hill, Oneida and Goldman Sachs.

We have posted the opportunities for the students with all of the New York law schools over the years and are close to having a student from every New York law school.

Ken Standard, the program's namesake and a past chair of the Section and past president of NYSBA, is actively involved in supporting the program.

Special thanks goes to the Diversity Internship Committee—Anne Atkinson, Mitchell Borger, Fawn M. Horvath, Barbara Levi, the original chair of the committee, Steven Nachimson, Gary F. Roth and Howard Shafer, all of whom have served since the inception of the committee. Finally, I acknowledge the great efforts of my co-chair Andrew Mannarino, who is leading the program this year while I serve as Chair of the section.

Andrew Mannarino and Anne Atkinson are heading our efforts on creating a robust Alumni program with the interns. I want to welcome Yamicha Stephenson, who was appointed to the executive committee as our intern Alumnus member.

If you would like to join the internship committee please contact me.

The program is great success and we hope to continue to build on past efforts.

Dave Rothenberg, Chair

The student participants being honored by Kenneth Standard, the Section, and the Bar Leadership.

THE NEW YORK BAR FOUNDATION
One Elk Street
Albany, New York 12207
(518) 487-5651
FAX (518) 487-5699

The Corporate Counsel Section Fellowship Fund

Your gift for The Corporate Counsel Section Fellowship Fund within The New York Bar Foundation will make the difference to a nonprofit organization in need of legal assistance support ***and*** to a law student from a diverse background seeking a Summer internship.

DONATE TODAY AND WATCH YOUR CONTRIBUTION HAVE TWICE THE IMPACT!

Charitable contributions to The New York Bar Foundation are tax-deductible, as permitted by law.

Through the Corporate Counsel Section Fellowship Fund, The New York Bar Foundation provides funding for a fellowship to give a first- or second-year student of a diverse background, who is attending a law school in the State of New York, the opportunity to pursue a 10-week Summer fellowship. The fellowship will take place at a New York public interest legal or charitable organization that The New York Bar Foundation's Board of Directors will select from among organizations that apply to the Foundation for a grant. The student will assist the organization's general counsel (or other similar individual holding a counsel position) with matters relating to counsel or advice to the organization. The fellowship goal is two-fold. First, to provide the selected organizations with an opportunity to have law students from a diverse range of backgrounds provide assistance without cost to the organization, and second, to provide students from a diverse range of backgrounds with an opportunity to experience in-house legal practice.

The Fund is a natural extension of successful efforts of The Corporate Counsel Section's Kenneth G. Standard Diversity Internship Program. Since the Program was established in 2006, 32 law students have been placed in internships throughout New York State.

Grant applications will be available at www.tnybf.org, click on "Apply for a Grant" on the right side of the home page (http://www.tnybf.org/grantapp.htm).

For more information contact the Foundation at foundation@tnybf.org or call 518-487-5651. You may also contact David S. Rothenberg, Chair of the Corporate Counsel Section at 212-357-2368 or David.Rothenberg@gs.com.

You can make a contribution by credit card by faxing this form to 518-487-5699 or online at https://www.tnybf.org/donation2.cfm (www.tnybf.org) or mail the form along with your check to **The New York Bar Foundation, One Elk Street, Albany, NY 12207-1002.**

Please accept my gift of _ $50 _ $100 _ $250 _ $500 _ $1,000 _ Other $_____

Please direct my restricted gift to the Corporate Counsel Section Fellowship Fund
___ Enclosed is my check payable to: **THE NEW YORK BAR FOUNDATION**

Card#_____ Expiration Date: _____

Authorizing Signature _____
NAME _____
ADDRESS_____
CITY_____ STATE___ ZIP_____

Matching Gift: If you (or your spouse) are employed by a firm/company that has a Matching Gift Program, please see your Human Resources Department for the proper form to include with your gift.

Inside-
Books

A Guide to the Good Life: The Ancient Art of Stoic Joy

William B.Irvine

Oxford University Press, 2009, 283 pages

Reviewed by Janice Handler

Before Dr. Phil, Dr. Ruth and Dr. Dean was Seneca. Seneca? Yes Seneca—and Marcus Aurelius, Epictetus, and Zeno. Contrary to what you might think, these are not just little known philosophers from ancient cultures. They are actually the first self help gurus of the western world. And this book review—aimed at the stressed and the self-helpers (and what lawyers are not?)—is going to tell you why.

A Guide to the Good Life by William B. Irvine, a professor of Philosophy at Wright State University in Dayton Ohio, calls on Greek and Roman Stoic philosophers to guide his readers through 21st Century challenges. Stoicism, says Dr. Irvine, is not, as many believe, the philosophy of stiff upper lips and hair shirts. On the contrary, it is a philosophy of life that promotes tranquility and joy. No navel gazing here. And precious few "oms," despite the similarities of Stoicism and Buddhism. Rather, there are sensible and comprehensible "to do" lists that rival those of any 12-step program.

Irvine begins with the proposition that the formation of a great goal in living and a philosophy of life, as well as the development of an effective strategy for attaining that goal, will help us live a more meaningful life. He then commends the timeless philosophy of Stoicism to the reader's attention as a method for formulating that great goal. But unlike many philosophers, Irvine's interest in Stoicism is not theoretical or historical—it is "resolutely practical" and endeavors to put Stoicism to work in the reader's life to alleviate negative emotions—anger, envy, anxiety, fear, and grief—and promote inner calm, tranquility, peace and joy.

In examining these concepts, Irvine speaks to the similarities between Stoicism and Buddhism—their common view of the transitory nature of the world around us, the importance of mastering desire, and the need to pursue tranquility. But Stoicism, says Irvine, is more suited to the practical and analytical than is Buddhism. No one hand clapping!

The goal of Stoics is not to banish all emotion—but to banish *negative* emotion. And to that end—and with the help of a bunch of dead white guys—Irvine derives from Stoicism effective self-help strategies that he maintains can "make us glad…to be the person we are, living the life we happen to be living…." Stoicism is concerned, not with moral right and wrong, but with having a good spirit, living a good and happy life. In short, it is a paradoxical recipe for happiness.

After offering a brief history of the origins of Greek and Roman Stoicism and busting the myth that Stoics are joyless passive players, Irvine sets forth strategies of everyday living to attain and maintain tranquility, including distinguishing the things we can control from those we cannot, learning how to keep other people from upsetting us, and becoming thoughtful observers of our own lives.

So what are the specific techniques prescribed by the Stoics to help us lead joyful lives? The first of these is negative visualization, a practice that helps us stop taking things for granted and value the things we have. The Stoic spends time imagining that he has lost the things he values and realizing that all things are on loan from Fortune. He kisses his spouse or child, knowing he might lose them. Negative visualization is therefore a way to regain appreciation of life and capacity for joy. **For me, not so much.** While Irvine calls this the single most valuable technique in the Stoic psychological toolkit, to me it was the least useful because, trust me, I already spend enough time imagining bad outcomes (though the Stoics also say there is a difference between *contemplation* and *worry*). But give it a try—these Stoics are smart guys!

More useful to me was a chapter about *not* being a control freak! The Stoics advise one to attain contentment by wanting only things she can be certain of attaining. And how do you do this? You learn to distinguish things wholly or partly within your control from things without and choose as your goals only the former (they call it the *Serenity* prayer for a reason). Thus, your goals become, not to "get a job," but to do five things every day to look for a job, not to lose weight, but to exercise 4 times a week, not to win a tennis match, but to play your best game. We behave foolishly if we worry about things that are not up to us; we should concern ourselves only with things we can take steps to bring about. This is subtle mind shift and even, as Irvine admits, a psychological mind game, but a useful one for the outcome-obsessed (sound like any lawyers you know?) who might spare themselves much

anxiety, frustration, and disappointment by continuously triaging their goals on an achievability scale.

Irvine sets out other psychological techniques of the Stoics (fatalism, self denial, and meditation), then specifically applies these to real life stages and issues, including grief, social relations, insults, old age, and dying. He concludes with practical pointers for practicing Stoicism and a reading list of both original sources and commentaries.

So why is this book review in a journal for in-house counsel? Because so many of us are stressed, sleepless, hyperventilating, multitasking, obsessive compulsive control freaks! (or maybe I speak only of myself). And if we want to change some of that, this book can help. But while Irvine makes Stoic philosophy accessible to the general reader, I strongly urge you not to stop with this book. The Stoics, unlike many philosophers, are readable and enjoyable. At a party many years ago, I asked a librarian what his all-time favorite book was. I expected one of the usual suspects—Tolstoy, Dostoevsky, Dickens. His answer—the *Meditations* of Marcus Aurelius, a book of which I had barely heard. It is now **my** all-time favorite as well. Maybe one day it will be yours.

Janice Handler is co-editor of *Inside*. She is the former General Counsel of Elizabeth Arden Cosmetics Co. and currently teaches Corporate Counseling at Fordham Law School.

Corporate Counsel Section Committee Chairpersons

CLE and Meetings
Steven G. Nachimson
Compass Group USA, Inc.
3 International Drive, 2nd Fl.
Rye Brook, NY 10573
steven.nachimson@compass-usa.com

Howard S. Shafer
Shafer Glazer LLP
90 John Street, Ste. 701
New York, NY 10038-3202
hshafer@shaferglazer.com

Diversity
Gregory H. Hoffman
BT Americas Inc.
620 Eighth Avenue
New York, NY 10018
greg.hoffman@bt.com

INSIDE/ Publications
Janice Handler
handlerj@aol.com

Allison B. Tomlinson
Gensler
1230 Avenue of the Americas
Ste. 1500
New York, NY 10020
allison_tomlinson@gensler.com

Kenneth G. Standard Internship Program
Andrew R. Mannarino
FBR Capital Markets
299 Park Avenue
New York, NY 10017
andsteph51@gmail.com

David S. Rothenberg
Goldman Sachs
200 West Street, 40th Fl.
New York, NY 10282
david.rothenberg@gs.com

Membership
Joy D. Echer
Foot Locker, Inc.
Law Department
112 West 34th Street
New York, NY 10120
jecher@footlocker.com

Thomas A. Reed
1172 Park Ave., Ste. 15-c
New York, NY 10128
tomreed2@me.com

Pro Bono
Steven H. Mosenson
The Center for Discovery
P.O. Box 840
Harris, NY 12742
smosenson@sdtc.org

Cynthia Beagles
The American Kennel Club, Inc.
260 Madison Avenue
New York, NY 10016
ccb@akc.org

Technology and New Media
Fawn M. Horvath
Macy's, Inc.
11 Penn Plaza, 11th Fl.
New York, NY 10001
fawn.horvath@macys.com

Natalie Sulimani
Sulimani Law Firm
116 West 23rd Street, Ste. 500
New York, NY 10011
natalie@sulimanilawfirm.com

On Your Mark for the Olympics

By Jonathan Armstrong

With the Olympics now a few months away most businesses are fine tuning their contingency plans. Businesses large and small, whether based in Europe or simply having people pass through need to be prepared. The Olympics will run from the 27th July to 12th August with venues all over London, together with events like football and sailing outside of the capital. There are likely to be significant extra visitors to London, not just those visiting the events themselves but armies of hospitality staff, security personnel, media, sponsors and hangers-on. There is no doubt that the Olympics will be a spectacular event and London will welcome visitors from around the world. For most organisations however planning is essential. Amongst the planning tasks to be included are those in the following areas.

Accommodation

Demand for hotel rooms is likely to be high. London hotels are busy in normal times but efforts have been made to increase capacity. The official London 2012 website claims that more than 100,000 hotel rooms should be available but some properties will be more in demand than others and some owners have rationed accommodation amongst regular guests. The Intercontinental Hotels Group is the Olympics partner hotel chain. The chain includes Intercontinental, Crowne Plaza, Hotel Indigo and Holiday Inn properties throughout the capital. Companies who use these properties may be wise to speak now to their preferred hotel to ensure availability or locate alternatives.

Transport

London's public transport was an element of the Olympic bid which scored poorly in the IOC's initial evaluation. However, significant improvements have been made since London won the bid in 2005.

Road transport around London is likely to be challenging as specific Olympic lanes have been designated for official traffic. For those without privileged access the tube will be at capacity on some routes, particularly at peak hours, and there is likelihood of tube station closures. London Transport expects around 800,000 extra bus passengers and severe delays could be experienced—more so if threatened industrial action by around 28,000 bus workers goes ahead. Black cabs may not be the reliable alternative, given that many cab drivers have said that they will not work Central London during the Olympics and given the introduction of new emissions regulations shortly prior to the Olympics, which might mean that a number of older black cabs have to be retired. For many owner-drivers, particularly those who work part-time, they will retire with their vehicles. There are additionally rumours of a short-term capacity issues in producing black cabs, which have lead in part to the authorities licensing an alternative van-based taxi. Even so, capacity issues should be planned for.

One alternative might be the recently introduced and highly sophisticated cycle hire scheme that exists in London, known locally as the "Boris Bikes." The Boris Bikes saw a considerable increase in activity during earlier transport strikes but, disproving the common saying, it seems that many users had forgotten how to ride a bike in the 30 years or so since they left school. For businesses contemplating advocating cycle use, it's important to prepare. This may include making provision for cycling proficiency courses and allocating space for bike and helmet storage. Employers could also consider taking the long-term hire of bikes for the duration of the Olympics. There are, however, employment and health and safety considerations in providing equipment. On a cultural note the terms "office bike" and "office bicycle" should be avoided.

Overground train services could provide another option for those visiting the main Olympics site. Special trains will run from St. Pancras (the terminus of the Eurostar trains in London) to the Olympic site on a new high-speed rail line using temporary platforms at Stratford raised with wood. It is estimated that an additional 4,000 train services with longer trains will run during the games.

Hospitality

Hospitality is likely to be significantly more expensive during the Olympics and there are already rumours of some restaurants increasing their prices to meet higher demand. For those fortunate enough to be entertaining at the Olympics, proper planning needs to be undertaken to avoid committing an offence under the Bribery Act 2010, which covers giving and receiving hospitality. Unlike equivalent U.S. legislation, there is no need for public officials to be involved—offences can be committed under the Act when one company executive invites another. Offences can be committed even if neither the giver nor the recipient are U.K. citizens. Given the prices of official hospitality packages, planning should include looking at guest lists and checking the motivation behind the hospitality being offered. Accepting hospitality is also under the scope of the Act, so if you have employees being entertained at the Olympics, you need to do those checks too.

When the U.K. bribery legislation was introduced the Ministry of Justice made it clear that hospitality is fully within the ambit of the new law, saying, "Hospitality and promotional expenditure can be employed improperly and illegally as a bribe." It seems to be the view of the U.K. government and the prosecutors that hospitality is often just the first act in a bribery play. For example, one of the prosecutors said during the implementation process that hospitality is "used…to groom employees… into a position of obligation and thereby prepare the way for major bribery." The MoJ's guidance also says that the sector of business should be taken into account. What is viewed as normal entertaining in some industries would likely appear lavish in others. The guidance also explains that travel and hospitality connected with the service offered is unlikely to be prosecuted—again showing the importance of working out the exact purpose of the hospitality and the itinerary for the trip.

Use of Social Media

It is likely that employees' use of social media and their personal Internet use will increase partly through a desire to follow events and partly to keep up to date with travel issues affecting the journey home. Employers may want to review their social media policies, look at a central Intranet portal for travel news and possibly relax elements of their policy for the period of the games. In addition it may be a good time to remind employees of the special restrictions which exist during the Olympics on advertising (see below) and of the need to have transparency on Twitter and Facebook when talking about your products or services. In the U.K., as in the U.S., the regulators are investigating companies whose employees used social media to promote their products without disclosing their relationship with the company.

Working from Home

For many organisations telling staff to work at home may be the answer. Be aware, however, of the fact that this is likely to have security implications. It is unlikely that employees will have a home Internet connection as secure as your corporate network. If they are using their own laptops or transferring information to home computers using email or USB sticks, be aware of the data security risk and consider whether you need to offer employees additional support, for example, virus protection or a security application like Computrace, in case their laptop is stolen. Data protection legislation makes an organisation responsible for the security of the personal data it holds—the Olympics' weeks are not excepted. You might want to make special provisions for employees who are dealing with more secure data; for example, you might want to prohibit online corporate banking from home. You may also need to check software licences, as some may prohibit use of devices which are not part of the corporate network. If you are encouraging home working look at the capacity of your network. For example, if your employees are going to access the corporate network over Citrix, make sure that you have enough licences in place and if you do have limits on your infrastructure, consider telling employees outside of London that you would like them to work in the office to free up Citrix capacity for London users.

Mobile bandwidth may also be an issue. As phones gets smarter and new devices like iPads enable us to use more and more bandwidth to do more and more things whilst mobile, the London mobile infrastructure has struggled to keep up. Providers are investing in adding capacity to the network but it is now a race against time, particularly as the demand for mobile access generally continues to increase. Last year's prolonged BlackBerry outage in London and the 7/7 terrorist bombings have taught us that coverage cannot be guaranteed. Companies who may need emergency access to their employees should consider contingency plans, which could include issuing them SIM cards from an alternative provider and a reporting procedure using landlines or face-to-face reporting if coverage goes down.

Advertising and Marketing

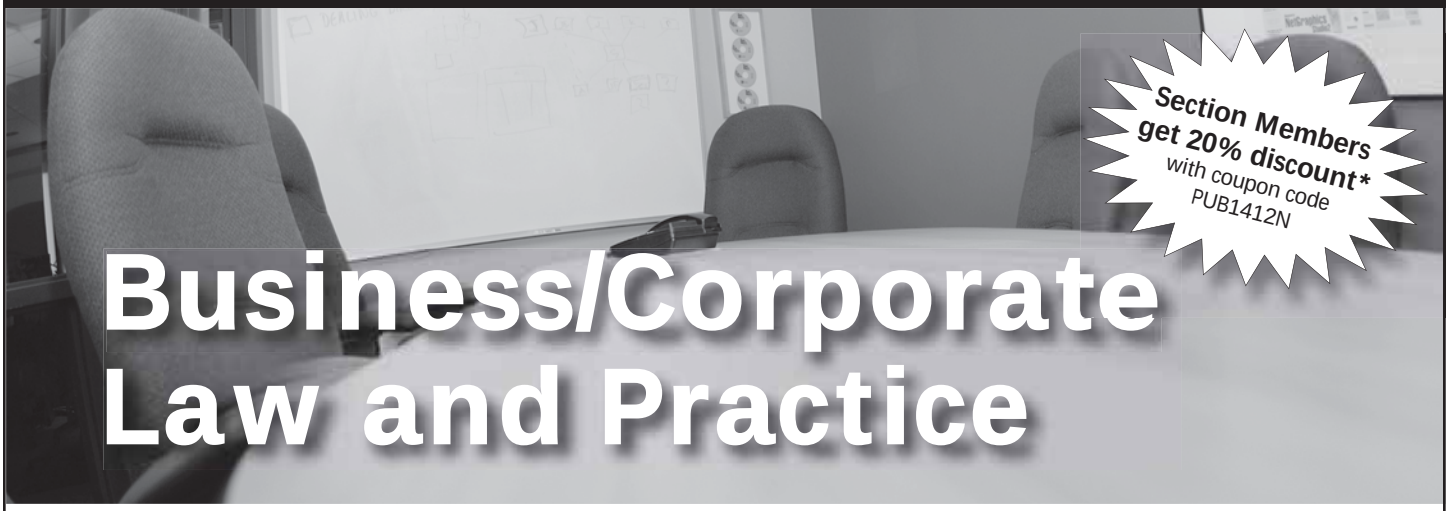
Be aware that specific regulations exist for the Olympics to prohibit ambush marketing. The organisers issued special guidance in April 2010 on their special powers. As with previous Olympics there is tightened trademark and copyright protection for Olympic symbols, words and logos. In addition, special laws deal with street trading, ticket sales and the unauthorised use of Olympics tickets as prizes in promotions. Coupled with that, U.K. law has protected sportsmen who have been featured in marketing campaigns without their consent. In one case, for example, a Formula 1 driver recovered damages after a radio station implied that he endorsed their coverage. If you are planning a event-related marketing campaign, make sure that you check that it is compliant.

Solutions

As with any good contingency plan, the primary solution is to think through what your business needs and how the Olympics might impact on your ability to do business. You might have capacity in other offices outside of London that you could use on a temporary basis. You may be able to manage your customer relationships, for example, by sending out July invoices earlier to avoid capacity issues at the end of July, which will also be the start of the Olympics. We have had experience in helping businesses plan for what promises to be a fantastic event.

Jonathan Armstrong is a partner at Duane Morris and a member of the Executive Committee of the International Section of the New York State Bar Association. He can be reached at jparmstrong@duanemorris.com.

From the NYSBA Book Store



Section Members get 20% discount* with coupon code PUB1412N

Business/Corporate Law and Practice

PRODUCT INFO AND PRICES*

2011-2012 / 886 pp., softbound
PN: 405191

NYSBA Members	**$90**
Non-members	$105

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

***Discount good until June 15, 2012.**

AUTHORS

Michele A. Santucci, Esq.
Attorney at Law
Niskayuna, NY

Richard V. D'Alessandro, Esq.
Richard V. D'Alessandro Professional Corporation
Albany, NY

Professor Leona Beane
Professor Emeritus at Baruch College and Attorney at Law
New York, NY

Professor Ronald David Greenberg
Larchmont, NY

The *Business Corporate Law and Practice* monograph has been updated and redesigned and is now part of the *New York Lawyers' Practical Skills Series***. The 2011-2012 release is current through the 2011 New York legislative session and is even more valuable with the inclusion of **Forms on CD**.

The updated case and statutory references and the numerous forms following each section, along with the practice guides and table of authorities, make this edition of *Business/Corporate Law and Practice* a must-have introductory reference.

**Formerly the New York Practice Monograph Series

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: PUB1412N

NYSBA

NEW YORK STATE BAR ASSOCIATION
CORPORATE COUNSEL SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

Inside is a publication of the Corporate Counsel Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without charge. Each article in this publication represents the author's viewpoint and not that of the Editors, Section Officers or Section. The accuracy of the sources used and the cases, statutes, rules, legislation and other references cited is the responsibility of the respective authors.

ISSN 0736-0150 (print) 1933-8597 (online)

Inside

Section Officers

Chairperson
David S. Rothenberg
Goldman Sachs
200 West Street, 40th Floor
New York, NY 10282
david.rothenberg@gs.com

Chairperson-Elect
Howard S. Shafer
Shafer Glazer LLP
90 John Street, Suite 701
New York, NY 10038-3202
hshafer@shaferglazer.com

Vice-Chairperson
Joy D. Echer
Foot Locker, Inc.
Law Department
112 West 34th Street
New York, NY 10120
jecher@footlocker.com

Secretary
Sarah M. Feingold
Etsy Inc.
55 Washington Street, Suite 512
Brooklyn, NY 11201
sarahfeingold@gmail.com

Treasurer and Vice-Chairperson
Jeffrey P. Laner
77-10 34th Avenue
Jackson Heights, NY 11372
jlaner@nyc.rr.com